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February 15, 2012

Via USPS Express Mail and US Mail, postage prepaid
Marvin Ann Patterson
Lamar County District Clerk
119 N. Main
Paris, Texas 75460

Re: Cause No. 80810, *TransCanda Keystone Pipeline, LP vs. The Crawford Family Farm Partnership;* in the County Court at Law, Lamar County, Texas

Dear Ms. Patterson:

Please find enclosed an original and one copy of TRANSCANADA KEYSTONE PIPELINE, L.P.'S MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND RESPONSE IN OPPOSITION TO THE CRAWFORD FAMILY FARM PARTNERSHIP'S MOTION FOR TEMPORARY AND PERMANENT INJUNCTION. Please file stamp the document in your customary manner and return the extra file-stamped copy to me in the enclosed self-addressed stamped envelope. A courtesy copy of the Motion is also being sent via electronic mail to the Honorable Judge Bill Harris.

Respectfully,

ZABEL FREEMAN

By: _____
Megan Anderson

Enclosures

Cc:

Via CM/RRR and Electronic Mail
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NO. 80810

TRANSCANADA KEYSTONE PIPELINE, L.P.,	§	**IN THE COUNTY COURT**
	§	
Plaintiff,	§	
	§	**AT LAW**
vs.	§	
	§	
THE CRAWFORD FAMILY FARM PARTNERSHIP,	§	
	§	
Defendant.	§	**LAMAR COUNTY, TEXAS**

TRANSCANADA KEYSTONE PIPELINE, L.P.'S MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND RESPONSE IN OPPOSITION TO THE CRAWFORD FAMILY FARM PARTNERSHIP'S MOTION FOR TEMPORARY AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff, TransCanada Keystone Pipeline, L.P. ("Keystone"), files this Motion to Dissolve Temporary Restraining Order and Response in Opposition to The Crawford Family Farm Partnership's Motion for Temporary and Permanent Injunction, and would show as follows:

I.
RELEVANT FACTUAL BACKGROUND

On February 13, 2012, this Court entered an ex parte temporary restraining order that prohibits Keystone from "possessing and using defendant's land in this eminent domain case from the date of entry of this order until and to the fourteen day after entry or until further order of this Court." Because this order was improperly entered ex parte, fails to recite the requisite bases for its issuance, and is contrary to Keystone's legal right of possession, it is void. Accordingly, Keystone brings this motion to dissolve the Court's order of February 13, 2012 and

respectfully requests that this Court grant it such other and further relief to which it may be justly entitled.

The Keystone XL Pipeline

Keystone is the owner and operator of the U.S. portion of the Keystone Pipeline System. The Keystone Pipeline System is comprised of approximately 2,151 miles of crude oil pipelines originating in Hardisty, Alberta and traversing to U.S. Midwest Markets at Wood River and Patoka, Illinois (Phase I) and from Steele City, Nebraska to Cushing, Oklahoma (Phase II). Keystone received a Presidential Permit for the Phase I border crossing in 2008. Keystone has proposed two additions to its existing Keystone Pipeline System consisting of 1,661 miles of pipeline, which are referred to as the Keystone XL Project.

Keystone is preparing to commence construction of the Keystone Gulf Coast Section of the Keystone XL Pipeline. The Gulf Coast Section of the Keystone XL Pipeline is a portion of Phase III of the Keystone XL Pipeline Project, which extends from Cushing, Oklahoma to the Port Arthur, Texas area. The Gulf Coast Section will transport U.S. crude oil obtained from various sources in the Cushing, Oklahoma area, including (i) crude oil produced from the Bakken Field in Montana and North Dakota, and (ii) other domestic crude oil shipped from oil fields in Texas, Oklahoma and surrounding states to the Port Arthur area. The Gulf Coast Section will also transport (a) Canadian crude oil which is shipped to Cushing, Oklahoma in the existing Keystone Pipeline Phases I and II, for which Keystone was issued a Presidential Permit in 2008, and (b) additional Canadian crude oil shipped from Canada to Cushing, Oklahoma via the Keystone XL Pipeline under Phase IV, once a Presidential Permit is obtained.

In order for Keystone to construct the Keystone Gulf Coast Section, it must exercise its power of eminent domain for the purpose of obtaining the necessary easements and rights-of-way interests to survey, clear and excavate along a route, to lay, construct, reconstruct, operate, maintain, inspect, test, repair, alter, protect, move, change the size of, substitute, remove, replace or abandon in place one (1) pipeline, not to exceed thirty-six inches (36") in nominal pipe diameter, for the transportation of crude petroleum, oil, and/or oil byproducts thereof (the "Pipeline"). Keystone must also acquire certain temporary work areas for construction and installation of the Pipeline.

Keystone's governing body, which is the Management Committee of Company (the "Governing Body"), by unanimous Consent, constituting the action of the Governing Body, has previously found and determined that public convenience and necessity requires the location, construction, operation and maintenance of the Pipeline for the transportation of crude oil; and that it is necessary and in the public interest for Keystone to enter upon, appropriate, take, acquire, hold and enjoy, by purchase or condemnation, permanent easements and rights-of-way and temporary construction easements, as are necessary for the construction of the Pipeline on property owned by The Crawford Family Farm Partnership ("Crawford") in Lamar County, Texas.

Keystone's Dealings with The Crawford Family Farm Partnership

For several years, Keystone and Crawford were in discussions regarding the route of the Pipeline and fair compensation for the easement rights sought by Keystone on the Crawford Property. After attempts to negotiate an easement with Crawford failed, on August 31, 2011, Keystone filed its Original Statement and Petition for Condemnation. On September 9, 2011, the Court appointed three disinterested freeholders of Lamar County to sit as Special Commissioners

to determine the fair market value of the easements sought by Keystone, and the Special Commissioners' set the matter for hearing on October 24, 2011. A week before the hearing, however, on October 17, 2011, counsel for Crawford requested additional time. Keystone agreed and the hearing was reset for November 28, 2011.

On November 28, 2011, Keystone appeared before the Special Commissioners and presented evidence. Even though the hearing had been rescheduled at Crawford's request, Crawford did not appear. Through the testimony of Randy Seale, a certified appraiser with the firm of Allen, Williford and Seale, Inc., and as supported by the appraisal he had prepared, Keystone presented evidence of the fair market value of the easements sought on the Property, as well as damages to the remainder property as a result of the easements. As Mr. Seale testified, the fair market value of the permanent easement sought by Keystone is $3,105, the fair market value for the temporary workspace easement is $655, the fair market value for the additional temporary workspace easement is $495 and the fair market value for the temporary access easement is $25. Mr. Seale further testified that there would be some damage to the remainder property in the amount of $3,577. In their Decision and Award, the Special Commissioners assessed the total damages to be paid by Keystone to Crawford for the condemnation at $10,395.

On December 1, 2012, Keystone deposited twice the amount of the Award in the registry of the Court and on December 19, 2011, Keystone filed a cost bond in the amount of $5,000, thereby entitling Keystone to possession of the Property. On December 15, 2011, counsel for Crawford requested that Keystone waive the necessity of formal service. While Keystone agreed to do so by way of a letter from its counsel to that effect on January 4, 2012, Keystone did not receive Crawford's objections until after Crawford obtained an ex parte TRO from this Court and

Keystone made a request to the Clerk to provide it with a copy of Crawford's filing. To date, Crawford has not served Keystone with its objections either formally or informally.[1]

On Thursday, February 2, 2012, without any prior discussion or attempt to coordinate among counsel, Crawford served Keystone with a notice of deposition for Keystone's "officers/employees." Only a few days later, on Tuesday, February 7, 2012 of last week, Keystone informed Crawford that the time and place unilaterally set by Crawford for the depositions would not work in light of the fact that Keystone would likely need to designate multiple witnesses and both the identities of those individuals and their schedules was still unknown. Crawford's counsel acknowledged the logistical issues involved and stated his understanding that a motion to quash would be filed.

On Friday of last week, February 10, 2012, Crawford's counsel sent an email asking to coordinate on deposition dates. Within three minutes of receiving the email from Mr. Pieratt, Ms. Burgert, Keystone's counsel, responded that she was out of the country but would be returning on Monday and happy to discuss the issue first thing Tuesday morning. Counsel for Crawford responded: "Sure. Bon voyage." There was no mention by Crawford's counsel of any hearing or the need for immediate relief or any other indication that a discussion on Tuesday morning, less than 2 business days later, would not suffice to address any issues in this litigation. Yet on Monday morning of this week, February 13, 2012, knowing that Ms. Burgert was out of the country, Crawford's counsel sought a hearing with this Court ex parte. No attempt was made to contact Ms. Burgert, although she had both cell phone and email available. No attempt was made to contact either of Ms. Burgert's law partners, Mr. Zabel or Mr. Freeman, both of whom

[1] It is notable that in the absence of service, Keystone has no obligation to prove its right to condemnation or otherwise undertake any action in this litigation. *See Denton County v. Brammer*, 361 S.W.2d 198, 202-03 (Tex. 1962).

appear on the pleadings in this case and were available on Monday to receive a call or email from either counsel or the Court.

II.
THE TRO ORDER IS VOID BECAUSE IT WAS IMPROPERLY GRANTED EX PARTE

Despite knowing that Keystone is represented in this matter and despite the fact that its counsel were available on Monday, February 13, 2012, it appears that there was no attempt to provide Keystone or its counsel with notice of the hearing on Crawford's request for temporary restraining order. The ex parte hearing was wholly improper and renders the TRO issued by this Court void.

Texas Rule of Civil Procedure 680 expressly provides that "[n]o temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." TEX. R. CIV. P. 680. Orders that fail to state why the order was granted ex parte are void. *See In re Office of Attorney General*, 257 S.W.3d 695, 697 (Tex. 2008).

As evidenced by the very existence of this proceeding, as well as Crawford's own filing, Crawford knew that Keystone had counsel in this matter and could easily have provided notice to Keystone of the hearing on February 13, 2012. No notice was provided. Moreover, the Court has failed to state any reason for proceeding with the TRO ex parte. Accordingly, this Court's order is void and must be dissolved. *See id.*

III.
THE TRO ORDER IS VOID BECAUSE IT FAILS TO SATISFY TRCP 680 AND 683

The February 13, 2012 TRO is void for the additional reason that it fails to comply with Texas Rules of Civil Procedure 680 and 683. The requirements of Rules 680 and 683 are

mandatory, must be strictly followed, and cannot be waived by the parties. *See InterFirst Bank San Felipe, N.A. v. Paz Constr. Co.*, 715 S.W.2d 640, 641 (Tex. 1986); *Evans v. Wood*, 34 S.W.3d 581, 582-83 (Tex. App.—Tyler 1999, no pet.). Failure to strictly comply with the requirements of these rules renders the order void. *Id.*

Rule 680 states that every temporary restraining order "shall define the injury and state why it is irreparable and why the order was granted without notice." *See* TEX. R. CIV. P. 680. Similarly, Rule 683 states that every temporary restraining order "shall be specific in terms [and] shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained . . .." *See* TEX. R. CIV. P. 683. A restraining order or injunction must state the reasons why injury will be suffered if the interlocutory relief is not granted, and the reasons must be specific and legally sufficient, and not mere conclusions. *See International Bhd. of Elec. Workers Local Union 479 v. Becon Constr. Co.*, 104 S.W.3d 239, 243-44 (Tex. App.—Beaumont 2003, no pet.). The specificity required by Rule 683 is not satisfied by the mere recital of "no adequate remedy at law" and "irreparable harm." *Id.* at 244.

The TRO in this case merely states that the order is issued because if Keystone is not restrained

> . . . it will commit possession and irreparable harm and use of [Crawford] and its Caddo artifacts without [Crawford's] jurisdictional Objections being heard and substantially changing the status quo currently between the parties before notice can be given and a hearing held on defendant's motion for temporary injunction; and that if plaintiff's commission of these acts is not restrained immediately, defendant will suffer immediate and irreparable harm.

The Order does not state what Keystone has done that is contrary to law or outside of its rights. By posting twice the amount of the Award and a cost bond, Keystone is entitled to possession of the easements on the Property. *See* TEX. PROP. CODE § 21.021. That is the status quo between the parties. The Order does not refer to any action by Keystone, let alone state why or how such

action is wrongful. Nor does the Order state what harm Crawford allegedly has suffered or why such alleged harm is not subject to remedy by some means other than a temporary restraining order. What does it mean that Keystone will "commit possession and irreparable harm and use of [Crawford] and its Caddo artifacts." The statement is nonsensical.

When a temporary restraining order fails to state how the moving party will suffer irreparable harm and fails to show that a legal remedy, such as monetary damages, is not available, the injunction is void. *Town of Palm Valley v. Johnson,* 87 S.W.3d 110, 111 (Tex. 2001); *see also Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 284 (Tex. 2004) (noting that it is a general rule of law that if a legal remedy is available then a party is not entitled to an injunction). The temporary restraining order issued by this Court on February 13, 2012 suffers from each of these deficiencies and is void.

IV.
CRAWFORD CANNOT PROVE THE ELEMENTS REQUIRED FOR ISSUANCE OF AN INJUNCTION

In general, an injunction is an extraordinary remedy that is not to be issued as a matter of right. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993) (citing *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas Ry. Co.*, 363 U.S. 528, 531-532, 80 S.Ct. 1326, 1328-29, 4 L.Ed.2d 1379 (1960)). An injunction is an equitable remedy that the trial court should only issue where the "intervention of a court in equity is essential in order [to effectively] protect property rights against injuries otherwise irremediable." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12, 102 S.Ct. 1798, 1802-03, 72 L.Ed.2d 91 (1982). The trial court is to balance the competing claims of the parties to determine whether to grant or deny an injunction. *Id.* at 312, 102 S.Ct. at 1803; *see also Brotherhood of Locomotive Eng'rs*, 363 U.S. at 532, 80 S.Ct. at 1329; *Surko Enter., Inc. v. Borg-Warner Acceptance Corp.*, 782 S.W.2d 223, 225 (Tex. App.—Houston [1st Dist.] 1989, no writ).

In order to establish a right to a temporary injunction, a party must plead and present evidence that (1) it has a probable right of recovery, and (2) it will suffer a probable injury in the absence of the injunction. *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975) (test for preliminary injunction is whether the plaintiff will suffer irreparable injury in the absence of the preliminary injunction and the plaintiff is likely to prevail on the merits); *see also Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex.1968); *Henderson v. KRTS, Inc.*, 822 S.W.2d 769, 773 (Tex. App.–Houston [1st Dist.] 1992, no writ). "Probable injury," however, subsumes the elements of imminent harm, irreparable injury, and no adequate remedy at law. *Univ. of Texas Medical School v. Than*, 834 S.W.2d 425, 428 (Tex. App.–Houston [1st Dist.] 1992, no writ); *Surko Enterprises*, 782 S.W.2d at 225; *Henderson*, 822 S.W.2d at 773 ("[p]robable injury includes the elements of imminent harm, irreparable injury, and no adequate remedy at law for damages . . ."). Thus, to obtain a temporary injunction, Crawford must plead and prove three specific elements: (1) a cause of action against Keystone; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (citing *Walling v. Metcalfe,* 863 S.W.2d 56, 57 (Tex. 1993) and *Sun Oil Co. v. Whitaker,* 424 S.W.2d 216, 218 (Tex. 1968)). An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard. *Butnaru*, 84 S.W.3d at 204 (citation omitted).

1. Crawford Has No Probable Right of Recovery

Crawford has premised its request for injunctive relief upon its contention that if Keystone is not restrained, Keystone will take possession of the easements to construct its pipeline, thereby upsetting the status quo. Contrary to Crawford's position, however, the status quo is Keystone's right of possession. As provided for under Section 21.021 of the Texas

Property Code, Keystone has the right of possession following its deposit of twice the amount of the Award and a cost bond with the Clerk. These monies are insurance against any finding that Keystone does not have the right to condemn. *See* TEX. PROP. CODE § 21.021.

Crawford has brought nothing forward in its motion to support a claim against Keystone other than conclusory statements. This is not sufficient to support the issuance of a temporary restraining order and the order should be dissolved.

2. There Is No Evidence of Imminent, Irreparable Harm

Likewise, Crawford has failed to show and cannot show that it will suffer imminent, irreparable harm. An injury is considered to be irreparable only if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard. *Butnaru*, 84 S.W.3d at 204. Crawford has failed to present any evidence that any damage it would suffer cannot be compensated in monetary terms (in fact, it is a monetary settlement that has been the end goal for Crawford from the beginning of its dealings with Keystone). Likewise, Crawford has failed to present any evidence that any damages could not be measured by any certain pecuniary standard (again, it is quantification of a monetary settlement that has been at the center of discussions for years).

In this case, Keystone has already posted twice the amount of the Award, which the Special Commissioners found to be the fair market value of the easements being sought by Keystone and damage to the remainder property. This amount is statutorily presumed to be sufficient damages. Section 21.044 of the Texas Property Code, specifically entitled "Damages from Temporary Possession," provides as follows:

> (a) If a court finally determines that a condemnor who has taken possession of property pending litigation did not have the right to condemn the property, the court may award to the property owner the damages that resulted from the temporary possession.

(b) The court may order the payment of damages awarded under this section from the award or other money deposited with the court. However, if the award paid to or appropriated by the property owner exceeds the court's final determination of the value of the property, the court shall order the property owner to return the excess to the condemnor.

TEX. PROP. CODE § 21.044.

Accordingly, the Texas Legislature has already determined that monetary damages can adequately compensate a property owner whose property has been possessed by an entity that did not have the right to condemn. There is no irreparable harm. The monies deposited by Keystone in this case under Section 21.021 of the Texas Property Code have already ensured that there is an adequate remedy available to Crawford in the event Keystone is found to not have the right of eminent domain. Damages have already been considered and to the extent that Crawford finds double the Award to be inadequate, it could have made an argument for a greater market value but instead chose to not attend the hearing before the Special Commissioners after specifically requesting that the hearing be reset for counsel's convenience.

There is no basis for the Court's issuance of a TRO where monetary damages are not only sufficient to cover any harm, but monies are in fact already on deposit with the Court.

3. Conclusion

Crawford has not shown and cannot show either that it has a probable right of recovery or that it will suffer imminent, irreparable harm. Accordingly, the temporary restraining order issued by this Court is improper and should be dissolved.

V.
THE BOND FILED BY CRAWFORD IS VOID AND, EVEN IF ACCEPTED, GROSSLY INSUFFICIENT

Texas Rule of Civil Procedure 684 requires that:

> [b]efore the issuance of the temporary restraining order or temporary injunction the applicant shall execute and file with the clerk a bond to the adverse party, with ***two or more*** good and sufficient sureties, to be approved by the clerk, in the sum

> fixed by the judge, conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part.

TEX. R. CIV. P. 684 (emphasis added). In this case, the bond filed with the Clerk has only a single surety, not two or more, and thus does not satisfy the requirements of Rule 684.

As the Texas Supreme Court held in *Lamar County Elec. Co-Op. Ass'n v. Risinger*, "good and sufficient" is a statutory requirement and a court is not authorized to judicially amend this requirement. 51 S.W. 3d 801, 804 (2001). Filing a bond with a missing surety, like the bond filed with the Clerk in this case, does not meet the requirement that the Legislature intended.

Further, there is no evidence in the bond that the one single surety, M. Mark Lesher, is in fact "good and sufficient." In *Lamar County Elec. Co-Op. Ass'n*, the Court held that the Texas Rules of Civil Procedure require "good and sufficient" sureties, and if challenged, the sureties should be subjected to examination in order to determine whether they are good and sufficient. *Id.* at 806. Because Crawford is seeking to interfere with the construction of multi-billion dollar pipeline project the fact that M. Mark Lesher is "good and sufficient" is crucial and the surety should be subjected to examination.

Further, even if the bond were proper, and supported by two or more good and sufficient sureties, it would fail its essential purpose of protecting a wrongfully enjoined party. As stated by the Texas Supreme Court, "[t]he purpose of the bond is to protect the defendant from the harm he may sustain as a result of temporary relief granted upon the reduced showing required of the injunction plaintiff, pending full consideration of all issues." *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 686 (Tex. 1990). In this case, Crawford is seeking to interfere with the construction of multi-billion dollar pipeline project that will employee thousands of individuals

and transport tens of thousands of barrels of crude a day to the Port Arthur area. A $5,000 bond is grossly inadequate to cover the monetary damages that will be incurred as a result of a wrongfully issued restraining order. Should this Court continue the TRO in this case, the bond must be set to a sum that is more closely commiserate with the damages that will stem from Crawford's wrongful interference.

CONCLUSION

Plaintiffs improperly obtained an ex parte TRO. The requirements of Texas Rules of Civil Procedure 680, 683 and 684 have not been met, rendering the TRO void. Moreover, even if the requirements of the Rules were satisfied, Crawford is not entitled to an injunction where it is unable to show a probable right of recovery or imminent, irreparable harm.

WHEREFORE, PREMISES CONSIDERED, TransCanada Keystone Pipeline, L.P. prays that this Court dissolve the temporary restraining order entered on February 13, 2012 and grant it such other and further relief to which it may be justly entitled.

Respectfully submitted,

ZABEL FREEMAN

By: _____

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ATTORNEYS FOR TRANSCANADA KEYSTONE PIPELINE, L.P.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February, 2012, a true and correct copy of the foregoing pleading was served on the following counsel in the manner indicated below.

John D. Pieratt
1301 W. 25th Street, Suite 510
Austin, Texas 78705
Via CM/RRR and Electronic Mail

Amy Marlyse Burgert